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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0525-13T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

IVELIS TURELL,

Defendant-Appellant.

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Submitted January 31, 2017 – Decided October 27, 2017

Before Judges Messano, Suter, and Guadagno.

On appeal from the Superior Court of New  
Jersey, Law Division, Mercer County,  
Indictment No. 09-02-0161.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Charles H. Landesman,  
Designated Counsel, on the brief).

Angelo J. Onofri, Mercer County Prosecutor,  
attorney for respondent (Laura Sunyak,  
Assistant Prosecutor, of counsel and on the  
brief).

PER CURIAM

Defendant Ivelis Turell appeals her convictions for second-degree reckless manslaughter and second-degree possession of a weapon for an unlawful purpose, for shooting and killing her

fiancé, Michael Whitaker. Defendant also appeals her seven-year sentence, imposed after the two charges were merged. Defendant claims errors in trial judge's jury charge and subsequent jury instructions, the prosecutor's summation, and her sentence.

I.

Michael Whitaker's father, James Whitaker, Jr., testified at trial that his son had lived with defendant on Ferry Street in Trenton for three or four years with their two children. On April 30, 2007, at approximately 9:00 p.m., James received a call from Michael. James described Michael as "very upset" and noticed "a trembling in his voice." Michael told his father, "I got to get out of here . . . I can't stay here . . . can I come over and sleep on the couch." James told Michael that he would leave the door open for him.

During the call, James could hear defendant "screaming and yelling" in the background "using some obscene language." James recalled hearing defendant say something like, "You ain't going nowhere motherfucker." After two or three minutes, the phone line "went dead." Michael never arrived that night and James learned from police the next day that his son was dead.

911 operator Ricardo Cabrera, received a call at 10:42 p.m. that evening, from an address on Ferry Street reporting someone had been shot inside the house. Officers Ismael Rivera, Jr. and

Gregory Hollo arrived within minutes and found Michael lying face down on the sidewalk near a large pool of blood. Rivera then noticed defendant sitting in the doorway of the home with the left side of her body against the wall or door frame and her feet on the top of the steps. Defendant had blood on the side of her neck.

Defendant told Rivera she could not feel the left side of her body. When Rivera asked what happened, defendant said her six-year-old son was playing with a handgun and shot Michael. Rivera asked where the child was and defendant said he was upstairs sleeping. Hollo found the child upstairs along with his brother. Rivera described defendant as "calm" and testified that she spoke in a "[n]ormal speaking sound" when stating that her son shot Michael. She was not crying and did not appear upset or disoriented.

While emergency medical personnel tended to defendant, Rivera entered the house to secure the handgun he saw on the floor in front of a bathroom. The gun, a 9-millimeter Ruger pistol, had blood on the slide and the end of the gun and the slide was pulled back. There was blood spatter in the kitchen and blood smears on the wall in the hallway leading to the kitchen from the living room. A cell phone and pieces of a phone were also found in the hallway.

Detective Scott Peterson and Sergeant Richard Fink arrived at the Ferry Street address and saw defendant sitting on the porch steps with a female EMT. After the EMT left, Peterson spoke to defendant who had gauze on her neck and blood on her shirt. Peterson described defendant as calm and a little upset, but not crying or disoriented. Defendant said that her six-year-old son got a hold of her boyfriend's gun and was playing with it when it accidentally went off, hitting Michael. She said the child then dropped the gun, causing it to discharge again with the ricochet hitting her. Defendant was then transported to the hospital.

Peterson and Fink went to the hospital and spoke with defendant in the emergency room. When Peterson asked defendant to tell him what happened, she told a completely different story, claiming she and Michael got into an argument over her son playing with Michael's handgun. At some point during the argument, defendant claimed Michael choked her in front of the children. Defendant then retrieved the gun and pointed it at Michael. When Michael asked what she was doing, she fired the gun and Michael was hit. She then dropped the gun, it went off, hitting the ceiling with the ricochet hitting her in the neck. Defendant also said that she was upset after Michael said he planned on leaving her and the children.

During this conversation, Peterson read defendant her Miranda<sup>1</sup> rights. Defendant said she was always in possession of the gun and made no mention of any type of struggle with Michael over the gun. Although one side of defendant's neck was bandaged, Peterson did not see any visible marks on the other side of her neck from being choked and there were no bruises on her face.

Later that evening, Michael died during surgery and Detective Edgar Rios of the homicide unit took over the case. Rios spoke with defendant at the hospital. After Rios advised defendant again of her Miranda rights, she gave a six-minute recorded statement.<sup>2</sup>

Defendant stated, when she arrived home around 7:30 p.m., Michael was in the basement bedroom. When Michael told defendant he wanted to leave, she responded that he could leave as long as he paid the credit card bills. Defendant then asked Michael to sign a letter acknowledging the bills and agreeing to pay them. They began to argue and defendant claimed Michael retrieved the gun from the top drawer in the bedroom. Defendant

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>2</sup> The 911 call and this recording were not included in the record on appeal.

grabbed for the gun and, while trying to take it from Michael, she claimed the gun went off.

Michael was shot in the right arm, just below the shoulder. Defendant told Rios that, after the gun went off, Michael fell onto the bed but then "ended up downstairs." Defendant said that Michael told her to call 9-1-1. After Michael went downstairs, defendant followed, carrying the gun. As defendant was trying to use the phone in the kitchen to call 9-1-1, she claimed the gun went off with the bullet striking a wall. She then decided to kill herself and shot herself in the neck.

One shell casing was found on the shelf of a computer table just past the bathroom on the first floor and another was found on the floor in the dining room. A total of five shell casings were found in the house, although defendant admitted to firing the gun only three times. Defendant was arrested and charged with murder and possession of a weapon for an unlawful purpose.

Defendant testified at trial that Michael was the father of her two children. She described an incident of domestic violence in April 2005 when Michael pushed her down the stairs. Although she was treated at a hospital, she told hospital personnel she fell down the steps and did not file a police report. She claims Michael punched her during an argument in October 2006. Police were called by neighbors but defendant

told them Michael didn't do anything because she didn't want to get him in trouble.

Defendant refinanced the house to pay some of Michael's debts, including child support and car payments. In 2005 and 2006, defendant worked as a bank teller. In December 2006, she met twice with a counselor to discuss problems at work because of physical and verbal abuse from Michael. Defendant lost her job at the bank after making a mistake on a deposit and claimed Michael "started getting more abusive" with her after that.

In March 2007, defendant began working as a secretary for a church. Michael was in the basement of the Ferry Street home at the time. When defendant went to the basement to check on her younger child, Michael was angry because she had not cooked dinner and accused her of "messing with somebody else." Defendant called Michael a "deadbeat dad" and Michael hit and choked her in front of their two-year-old. Defendant claimed she could not breathe and Michael only let go after she kicked him. When defendant tried to go upstairs, Michael locked her in the basement. She remained locked in the basement for twenty-five to thirty minutes and when Michael let her out, she told him she was tired of him hitting her in front of the kids and that she had told the priest about "you and your pornos." Michael then slapped her and she told Michael that he had to

leave. Defendant grabbed a bag from the kitchen and went upstairs to pack Michael's clothes.

Defendant packed Michael's clothes as the youngest child slept on the bed. When Michael came into the room, he asked, "Bitch, what the fuck you doing with my clothes." She repeated that he had to leave. Michael then retrieved his gun from the dresser and pointed it at defendant. As Michael pointed the gun at her, defendant pushed the gun away. Michael, who was leaning toward the bed, fell back onto his knees, dropping the gun on the bed. They struggled for the gun and as defendant was trying to take the gun from Michael, it went off, striking him. She claimed it was an accident and that she would never have shot Michael.

Michael began to throw up blood and told defendant to call 9-1-1. Defendant claimed the phone in the bedroom did not work so she grabbed the gun and then went downstairs to the kitchen to make the call. Michael followed her downstairs. Defendant claimed she called 9-1-1 but it was "busy." Defendant then shot herself in the shoulder, with the bullet coming out her back and hitting the ceiling. She explained that she shot herself because she "couldn't help him."

Michael then "got up, and he went towards outside to get help" and she "dragged" herself towards the phone in the living



room to call 9-1-1. Michael "laid down on the sidewalk."

Defendant remembered telling a police officer that the gun went off accidentally, but did not remember talking to Peterson at the scene or at the emergency room. Defendant recalled speaking with Rios in the hospital.

On cross-examination, defendant denied telling the police that her son had accidentally shot and killed Michael or that the child had been playing with the gun. She also denied other statements, including that she told Peterson she had "freaked out" after she realized that she shot Michael or that the gun dropped and went off.

Defendant called Cindy Levine, a licensed clinical social worker who authenticated a clinical assessment she prepared after meeting with defendant in December 2006 and confirmed she met with defendant twice in December 2006 for counseling services.

Defendant also called New Jersey State Police Detective Michael McCormick, who had processed the gun for fingerprints and found no fingerprints as the gun had been cleaned with hydrogen peroxide. McCormick did not know who cleaned the gun but testified it was likely done to remove blood or biohazards "to render it safe."

Dr. Raafat Ahmad, the Mercer County Medical Examiner, who conducted the autopsy for Michael, found the cause of death to be a gunshot wound to just below the right shoulder. Ahmad estimated the muzzle of the gun was between twelve and twenty-four inches away from Michael's arm and classified the manner of death as homicide.

On cross-examination, Ahmad agreed that she could not rule out that some of the additional abrasions on Michael's body were "due to a fight," but she noted that he was "found dead on the sidewalk with his hands underneath him."

Dr. Luis Francis D'Amelio, Chief of Surgery and Director of Trauma Services for the Capital Health Regional Medical Center, testified as an expert in trauma, surgery, and pharmacology. He oversaw the treatment of defendant when she was brought in on April 30, 2007. Defendant had exploratory surgery on her neck to determine the extent of her injuries but D'Amelio found the bullet "went in the neck and went out by the shoulder blade" and found "nothing else wrong."

James Joyce, an investigator with the New Jersey State Police, testified for the State as an expert in ballistics and firearm identification, that the gun was operable and the two discharged bullets and five shell casings found at the scene came from that gun.

Carl A. Leisinger, III, the owner of CAL III Enterprises, a forensic ballistics and firearms consulting firm, testified for defendant as an expert in firearms operability and firearms identifications. Leisinger challenged the State's expert opinion about the pull of trigger pressure on the gun.

On March 21, 2013, the jury returned verdicts of not guilty on aggravated manslaughter and passion/provocation manslaughter but guilty on reckless manslaughter and possession of a firearm with an unlawful purpose.

On July 12, 2013, the trial judge denied defendant's motion for a new trial and imposed sentence.

## II.

Defendant now appeals and raises the following points:

### POINT I

THE TRIAL JUDGE'S CHARGE TO THE JURY AS TO SELF-DEFENSE WAS ERRONEOUS BECAUSE HE DID NOT INSTRUCT THE JURY THAT THE DOCTRINE OF SELF-DEFENSE APPLIED TO THE LESSER INCLUDED OFFENSE OF RECKLESS MANSLAUGHTER.

### POINT II

THE TRIAL JUDGE'S CHARGE TO THE JURY AS TO SELF-DEFENSE WAS ERRONEOUS AND CONTRARY TO LAW AS TO THE DUTY OF DEFENDANT TO RETREAT FROM HER DWELLING.

POINT III

PREJUDICIAL ERROR WAS COMMITTED BY THE TRIAL COURT WHEN IT DID NOT INSTRUCT THE JURY THAT THE DEFENDANT SHOULD BE FOUND NOT GUILTY OF A HOMICIDE IF IT FOUND THAT THE DEATH OF MICHAEL WALKER WAS ACCIDENTAL. (NOT RAISED BELOW)

POINT IV

THE TRIAL JUDGE GAVE THE JURY AN ERRONEOUS INSTRUCTION TO CONTINUE DELIBERATIONS WHEN IT APPEARED THAT THE JURY WAS UNABLE TO REACH A UNANIMOUS DECISION.

POINT V

THE PROSECUTOR'S SUMMATION TO THE JURY IMPROPERLY SOUGHT A GUILTY VERDICT BY APPEALING TO THE JURY'S EMOTIONS RATHER THAN ARGUING THE FACTS AND THE EVIDENCE.

POINT VI

THE TRIAL JUDGE IN FINDING AGGRAVATING FACTOR NINE WHICH INVOKES THE NEED FOR DETERRING DEFENDANT AND OTHERS FROM VIOLATING THE LAW DID NOT SET FORTH A NEED FOR SPECIFIC DETERRENCE.

Defendant argues that the trial judge erred in failing to instruct the jury that the doctrine of self-defense applied to the lesser included offense of aggravated and reckless manslaughter. The indictment charged defendant with first-degree murder, N.J.S.A. 2C:11-3(a)(2) (count one); second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (count two); and third-degree unlawful possession of a

weapon, N.J.S.A. 2C:39-5(b) (count three). In addition to the murder charge, the judge submitted the lesser included charges of passion/provocation manslaughter, aggravated manslaughter, and reckless manslaughter.

During a charge conference, the judge circulated a copy of the proposed charge and noted that counsel had agreed that there was "not going to be any offering of contrasting factual theories of causation" or summaries of the "evidence relevant to recklessness" as such matters would be handled by closing arguments. The judge specifically stated "[w]e're not going to summarize the evidence relevant to recklessness, as we're going to leave that to counsel in closing." Defendant's counsel raised no objection to the proposed charge.

After summations, the judge instructed the jury, "the indictment charges that the Defendant has committed the crime of murder. The Defendant contends that . . . if the State proved she used or threatened to use force upon the other person, that such force was justifiably used for her self-protection or protection of others." The judge went on to provide a comprehensive instruction on self-defense, followed by the elements of murder, passion/provocation manslaughter, aggravated manslaughter, and reckless manslaughter.

When the judge instructed as to the firearm possession charge, he referred back to the self-defense instruction and noted:

Earlier in the charge, I instructed you on the concept of self-defense as it applies to the offense of murder. The concept of self-defense as it applies to that offense is different than that of protective purpose that applies to this count of the indictment. When applied to that offense, self-defense requires a defendant to have an honest and a reasonable belief in the need to use force.

Defendant made no objection to judge's charge and made no request to recharge self-defense as to the lesser included offenses. As a result, this issue will be reviewed as one of plain error. R. 2:10-2. Applying that standard, an error is reversible if it was "clearly capable of producing an unjust result." Ibid. "If a defendant fails to object to a trial court's instructions, the failure to challenge the jury charge is considered a waiver to object to the instruction on appeal." State v. Maloney, 216 N.J. 91, 104 (2013) (citing Rule 1:7-2).

Plain error in the context of a jury charge is "[l]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result."

[State v. Torres, 183 N.J. 554, 564 (2005)  
(alteration in original) (quoting State v.  
Jordan, 147 N.J. 409, 422 (1997))].

"The charge must be read as a whole in determining whether there was any error." Ibid.

Defendant claims that, after giving the jury a self-defense charge prior to the murder instruction, the judge's failure to repeat the self-defense charge "for the lesser included offenses of aggravated manslaughter and reckless manslaughter . . . was erroneous and prejudicial."

When defendant's sentencing counsel moved for a new trial, he raised the same issue. In denying the motion, the trial judge noted that defendant's trial testimony was that Michael was shot accidentally, when he dropped the gun on the bed and defendant grabbed it and did not support a self-defense charge.

Defendant relies on State v. Rodriguez, 195 N.J. 165 (2008) and State v. O'Neil, 219 N.J. 598 (2014), in support of her claim that self-defense is applicable to a charge of reckless manslaughter and that therefore the court erred in failing to instruct the jury as such.

In Rodriguez, the Court "held that a person who acts in self-defense and 'kills in the honest and reasonable belief that the protection of his own life requires the use of deadly force' cannot be convicted of murder, aggravated manslaughter, or

manslaughter." O'Neil, supra, 219 N.J. at 601 (quoting Rodriguez supra, 195 N.J. at 172). Where the evidence could support self-defense as the justification for a homicide, the trial judge must instruct the jury that self-defense is a complete defense to aggravated and reckless manslaughter as well as to murder and that the State has the burden to disprove the self-defense justification. Rodriguez, supra, 195 N.J. at 174-75.

Here, defendant alleged that the gun went off accidentally, not that she shot Michael in self-defense. The trial judge determined that defendant's trial counsel "remain[ed] silent" and did not request a self-defense charge on the manslaughter charges or object when it was not given. In the absence of such a request, we must now determine whether the trial judge was required to sua sponte charge self-defense as to the lesser included reckless manslaughter charge.

The judge based his decision on his finding that "even when the gun was being pointed in [defendant's] face, she was not under any fear that she was being subjected to deadly force." The judge relied on defendant's testimony that when Michael pointed the gun at her, she did not believe he was going to pull the trigger and waived her hand "like she was swatting away a fly." The judge also concluded that there was no struggle for the gun.



Our review of defendant's testimony does not support the judge's conclusions. Defendant testified that when Michael retrieved the gun and pointed it at her she said, "Mike, you better take that gun away from me." When asked how she felt when the gun was pointed at her, defendant replied, "I was scared. He already had finished choking me, where I didn't have no breathing, I was dizzy." When Michael fell and the gun dropped to the bed, defendant clearly testified that she and Michael "struggled for the gun. . . . we were struggling for like a minute, he tried to grab it. I end up grabbing it, pulling it towards me, and it went off."

Based on this testimony, the judge was required to instruct the jury on self-defense not only on the murder charge but on the manslaughter charges as well. As we are remanding this for a new trial, we take the opportunity to address defendant's claim that the judge failed to properly instruct the jury as to defendant's duty to retreat.

On that subject the judge charged:

If you find that the Defendant knew that she could avoid the necessity of using deadly force by retreating, provided that the Defendant knew she could do so with complete safety, then the defense is not available to her.

The confrontation occurred in defendant's home, which "is accorded special treatment within the justification of self-defense." State v. Montalvo, 229 N.J. 300, 319 (2017).

"Traditionally self-defense claims require that a person who can safely retreat from the confrontation avail themselves of that means of escape." Id. at 320 (quoting State v. Gartland, 149 N.J. 456, 466 (1997)). That requirement is suspended under the "castle doctrine . . . if the confrontation takes place in one's home or 'castle.'" Ibid. (alteration in original) (citation omitted). N.J.S.A. 2C:3-4(b)(2) provides in pertinent part:

The use of deadly force is not justifiable under this section unless the actor reasonably believes that such force is necessary to protect himself against death or serious bodily harm; nor is it justifiable if:

(a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or

(b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(i) The actor is not obliged to retreat from his dwelling, unless he was the initial aggressor;


[emphasis added.]

Because defendant did not request this instruction and the judge did not provide it, we review this instruction for plain error. R. 1:7-2. Plain error refers to any error "clearly capable of producing an unjust result." R. 2:10-2. Regarding a jury instruction, "plain error requires demonstration of 'legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.'" State v. Chapland, 187 N.J. 275, 289 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970)).

The State argues that defendant's acquittal on the murder charges renders any "perceived error" in the duty to retreat instructions harmless. We disagree. Defendant testified that Michael was the initial aggressor, retrieving the gun from the dresser and pointing it at her. Under these circumstances, defendant had no duty to retreat and the judge's failure to convey this principle rendered the instructions erroneous. Because the erroneous instructions were capable of producing an unjust result in this matter, we hold that they constitute plain error. Montalvo, supra, 229 N.J. at 323.

Defendant's convictions are reversed and the matter is remanded for a new trial on the reckless manslaughter and weapons charges. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION